

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: CRIMINAL TERM PART 33  
-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-against-

Ind. No. [REDACTED]

[REDACTED],  
Defendant  
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Miriam Cyrulnik, J.S.C.:

A *Dunaway / Huntley / Mapp* hearing was conducted on November 13, 2020. The People called Sergeant Ramil Casmir and Police Officer William Schumacher as witnesses. Having had the opportunity to hear the testimony of the witnesses, observe their demeanor, assess their veracity and review the exhibits received in evidence, the court now makes the following findings of fact, based upon the material, relevant and credible evidence adduced:

Findings of Fact

On August 9, 2019, Sergeant (then-Police Officer) Ramil Casmir was on Anti-Crime patrol within the confines of the 75<sup>th</sup> Precinct. He and his partner, Police Officer William Schumacher, were in plain clothes in an unmarked police vehicle. Sergeant Casmir testified that the purpose of Anti-Crime patrol is "...to address crimes in progress. Also, removing illegal firearms from the street" (Hearing Transcript at 5-6). Officer Schumacher described Anti-Crime as "...proactive policing, focused on crimes in progress, mostly felonies" (*id.* at 42). In addition to making approximately 20 firearm arrests and participating in 50 to 60 others, Sergeant Casmir asserted that he has also issued "numerous" summonses for jaywalking (*id.* at 6), referring to it as a non-priority offense that he is empowered to address even while on an Anti-Crime assignment (*id.* at 22).

At approximately 5:15 a.m. on that date, Sergeant Casmir and Officer Schumacher were in

their unmarked police vehicle in the vicinity of 195 Cozine Avenue, at its intersection with Vermont Street. At that time they observed a male and a female, walking eastbound on Cozine Avenue. The two crossed the street against a steady red light and outside the crosswalk (*id.* at 7, 43), and headed north on Vermont Street.<sup>1</sup> After briefly following the two individuals in their vehicle, Officer Schumacher called to them, identified himself as a police officer and asked them to stop. The male said “no” and they both ran toward the rear of 195 Cozine Avenue (*id.* at 44). Both officers got out of the car, Sergeant Casmir following defendant, and Officer Schumacher following the male. Officer Schumacher apprehended the male and escorted him to a fence line along a nearby sidewalk.

According to Sergeant Casmir, the two individuals “...were, in a sense, beginning to run away” when he got out of the police vehicle (*id.* at 8). He ran after defendant with his badge displayed, identifying himself as a police officer, although he could not recall if he did so before they ran (*id.*). Defendant “continued to walk or run, in a sense, a fast-paced walk” until he caught up to her and physically “escorted her” to where Officer Schumacher stood with the male (*id.* at 8-9). On cross examination, he conceded that in his grand jury testimony, he described that step as “physically grabb[ing] her and return[ing] her back to where my partner was” (*id.* at 25).

Once he reached his partner’s location, Sergeant Casmir told defendant that he was stopping her for jaywalking and asked her if she had identification. In response, defendant reached toward the large tote bag hanging from her shoulder (*id.* at 9). Sergeant Casmir stopped her by physically grabbing her arm and directing it away from the bag (*id.* at 9-10). According to Sergeant Casmir, after he stopped her from reaching into her bag, he was able to look down into it and observed what

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<sup>1</sup> Both Sergeant Casmir and Officer Schumacher identified defendant as the female they observed.

he believed to be the slide of a handgun (*id.* at 10). He recognized the shape and color, based upon his experience with handguns. On cross examination, however, he stated “I don’t remember when I saw the slide of the gun, but I remember looking inside the bag at some point and noticed the slide of the gun” (*id.* at 27).

Sergeant Casmir removed defendant’s bag from her shoulder and placed it on the ground between them (*id.* at 11). He stated that once it was on the ground, the weight of the contents caused the bag to open wider and he was able to see a gun inside the bag (*id.*). He proceeded to ask her several questions about her identification and pedigree, with the bag at their feet, and then asked her to stand against the nearby fence (*id.* at 33-34).

Once she did so, Sergeant Casmir turned back to the bag. After shining his flashlight into it and moving items around, Sergeant Casmir found a handgun (*id.* at 12). Sergeant Casmir acknowledged on cross examination that defendant’s bag contained numerous other items, including toilet paper and plastic bags (*id.* at 19).<sup>2</sup> He also acknowledged that defendant’s bag contained a yellow t-shirt, but denied that the handgun was wrapped in it (*id.* at 20).<sup>3</sup> Only after he searched the bag for close to 30 seconds did Sergeant Casmir alert his partner that he found a firearm by repeating a pre-arranged code word (*id.* at 35-36). Defendant was then placed in handcuffs and transported to the 75<sup>th</sup> Precinct for arrest processing.<sup>4</sup>

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<sup>2</sup> A photograph of defendant’s bag, depicting its contents, including toilet paper and plastic bags, was entered into evidence and Defendant’s Exhibit A.

<sup>3</sup> A photograph of defendant’s bag, depicting its contents, including a yellow t-shirt, was entered into evidence as Defendant’s Exhibit B.

<sup>4</sup> Sergeant Casmir’s interaction with defendant, from the moment he caught up to her to the moment he handcuffed her, was recorded on his body-worn camera. The video from the body-worn camera was entered into evidence as People’s Exhibit 1. The alleged jaywalking

As the arresting officer, Officer Schumacher was responsible for vouchering the property recovered from defendant, which included the handgun, her bag and its other contents. He, too, acknowledged that the contents included toilet paper, plastic bags, and various items of clothing. Contrary to Sergeant Casmir, however, Officer Schumacher acknowledged that the firearm was wrapped in a yellow cloth (*id.* at 53).

At the 75<sup>th</sup> Precinct, Officer Schumacher was joined by Detectives Newton and Ramirez to interview defendant. She remained in a holding cell from her arrival at the precinct, at approximately 6:00 a.m., until the officers were ready to interview her, at approximately 3:00 p.m. (*id.* at 45). Although he was charged with her care while in police custody, Officer Schumacher did not know if defendant was provided with food, water, or use of the toilet facilities during the roughly nine hours she spent in the holding cell (*id.* at 55-56). He did not recall engaging in any conversation with defendant before the interview. Officer Schumacher did not make any threats or promises to defendant and was not aware of any other officers doing so (*id.* at 46).

Once in the interview room, *Miranda* warnings were administered (*id.* at 45). After acknowledging her understanding of each warning, defendant declined to answer questions (*id.* at 47). The officers explained that she could decide which questions to answer, but she persisted in her refusal, stating that she wanted to go home. The interview was immediately terminated and defendant was led out of the interview room (*id.* at 48).<sup>5</sup>

According to Officer Schumacher, he was escorting defendant back to the holding cell when

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preceded the activation of the sergeant's body-worn camera and was, therefore, not captured on video.

<sup>5</sup> The video recording of defendant's first interview with the officers was entered into evidence as People's Exhibit 2.

she indicated that she had changed her mind and was now willing to answer questions (*id.*). Officer Schumacher briefly lodged defendant in the holding cell while he consulted the detectives. Within approximately 20 minutes of the termination of the first interview, defendant was returned to the interview room where the questioning recommenced (*id.*). Although they confirmed that she still understood her rights, the officers did not repeat the administration of *Miranda* warnings before questioning defendant (*id.* at 58).<sup>6</sup>

### Probable Cause

In *People v De Bour*, 40 NY2d 210 (1976), the Court of Appeals established a graduated four-level test for evaluating the propriety of police encounters when a police officer is acting in a law enforcement capacity. The first level permits a police officer to request information from an individual, and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality. The second level, known as the common-law right of inquiry, requires a founded suspicion that criminal activity is afoot, and permits a somewhat greater intrusion. The third level permits a police officer to forcibly stop and detain an individual. Such a detention, however, is not permitted unless there is a reasonable suspicion that an individual is committing, has committed, or is about to commit a crime. The fourth level authorizes an arrest based on probable cause to believe that a person has committed a crime.

(*People v Abdul-Mateen*, 126 AD3d 986, 987-988 [2d Dept 2015], citing *People v Moore*, 6 NY3d 496 [2006] and *People v Hollman*, 79 NY2d 181[1992]).

While the court might call it curious that experienced Anti-Crime officers chose to protect the public from the scourge of pre-dawn jaywalking, the sworn testimony that Sergeant Casmir and Officer Schumacher observed defendant jaywalk is uncontroverted. Having personally observed

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<sup>6</sup> The video recording of defendant's second interview with the officers was entered into evidence as People's Exhibit 3. That interview included defendant's consent to the taking of a DNA sample.

defendant commit a violation of the Vehicle and Traffic Law, Sergeant Casmir was authorized to perform a level three *DeBour* stop to request her identification and take the appropriate police action.

However, while the evidence may have established that Sergeant Casmir's initial stop of defendant was lawful, it fails to establish the existence of probable cause for her arrest for possession of a handgun.

The applicable legal principles are well established and beyond dispute:

In order to sustain a finding that the police had probable cause to arrest, the evidence must show that they were possessed of information which would lead a reasonable person to conclude that it is "more probable than not" that a crime has been committed and that the person being arrested is the person who committed it. A lawful arrest "does not require proof to a mathematical certainty, or beyond a reasonable doubt."

(*People v Radonicic*, 239 AD2d 176, 179 [1<sup>st</sup> Dept 1997], *lv denied* 90 NY2d 897 [1997][citations omitted]; *see also People v Geddes*, 171 AD3d 1210 [2d Dept 2019], *lv denied* 33 NY3d 1069 [2019]; *People v Williams*, 127 AD3d 1114 [2d Dept 2015], *lv denied* 26 NY3d 972 [2015]).

In this regard:

[T]he subjective beliefs of the arresting officers are not controlling on the issue of whether probable cause exists for an arrest. Rather, it is for the court to make this determination upon a review of all relevant objective information known to the officer at the time of arrest.

(*People v Bandera*, 204 AD2d 340, 341 [2d Dept 1994], *lv denied* 83 NY 2d 1002 [1994][citations omitted]; *see also People v Peters*, 136 AD2d 750 [2d Dept 1988], *lv denied* 72 NY2d 864 [1988]).

Judicial evaluation of police action must be based on objective criteria and not on an officer's subjective view of his right to make an arrest, with due consideration given to the expertise of [the officers] (*see People v Lynch*, 178 AD2d 779 [3d Dept 1991], *lv denied* 79 NY2d 949 [1992]).

The information known to an officer may include “what he ... has seen, learned and heard as a trained officer [citation and internal quotation marks omitted]” (*People v Virola*, 300 AD2d 822, 823 [3d Dept 2002], *lv denied* 99 NY2d 633 [2003]). Courts are instructed to consider all the facts and circumstances together; “[v]iewed singly, the[y] may not be persuasive, yet when viewed together the puzzle may fit and probable cause found [citation and internal quotation marks omitted]” (*People v Quarles*, 187 AD2d 200, 203 [4<sup>th</sup> Dept 1993], *lv denied* 81 NY2d 1018 [1993]; *see, e.g., People v Letendre*, 264 AD2d 943 [3d Dept 1999], *aff’d* 94 NY2d 939 [2000]; *People v Curry*, 294 AD2d 608, 611 [3d Dept 2002], *lv denied* 98 NY2d 674 [2002]).

The People need not present proof beyond a reasonable doubt, or even establish a *prima facie* case; “what must be shown is that it was ‘more probable than not’ that an offense has occurred and that defendant was the perpetrator” (*People v Horsman*, 152 AD2d 859, 860 [3d Dept 1989]). On the motion to suppress, the People have the burden of establishing the legality of the police action in the first instance (*People v Maiwandi*, 170 AD3d 750, 751 [2d Dept 2019]).

In the case at bar, the totality of the evidence fails to support a finding of probable cause. Based upon Sergeant Casmir’s testimony and, particularly, the videotape recording from his body-worn camera (People’s Exhibit 1), the court cannot credit his account of the events that led him to discover the handgun in defendant’s bag.

The body-worn camera, which Sergeant Casmir testified was positioned at his sternum, provides the most reliable evidence of his perspective and actions during his encounter with defendant. It provides an indisputable depiction of the lighting conditions, the parties’ respective positions and their physical interaction.

Although Sergeant Casmir claimed that he was able to see into her bag when defendant attempted to reach into it, the videotape recording clearly establishes that this could not have been

possible. Once he stopped and escorted her to the location where his partner was holding the male being detained, Sergeant Casmir and defendant were within arm's length of each other. However, they did not face each other precisely squarely. Defendant's right shoulder was closer to Sergeant Casmir, while her left shoulder was positioned further away from him. After asking her if she had identification, Sergeant Casmir was close enough to grab defendant's right arm when she attempted to reach into the bag that was hanging on her left shoulder. Sergeant Casmir testified that after he prevented defendant from reaching into the bag, he was able to look down into it while it was somewhat off her shoulder. It was at this time that he claims to have observed the slide of a handgun in the bag.

However, the video evidence contradicts his account in significant respects. It clearly shows that the bag was hanging on defendant's left shoulder, with her torso between it and Sergeant Casmir. Although he testified that the bag was somewhat off her shoulder, the videotape recording does not show the bag open to any significant degree after he prevented her from reaching into it. No part of the interior of bag, or its contents, is visible in the videotape recording. Indeed, the bag is mostly in shadow. Additionally, Sergeant Casmir would have had to look across defendant's body and down into the bag to see anything inside if it had opened as he described. Even taking into account that his body-worn camera was positioned several inches below his head, the videotape recording clearly establishes that Sergeant Casmir could not have seen into the bag while it was on defendant's shoulder.

This court finds instructive the ruling in *People v Lebron*, 184 AD2d 784, 787 (2d Dept 1992), in which the appellate court found that

...the officer's claim that, from the distance of a foot, he was able to see into the defendant's six or seven-inch-deep pocket (which was conveniently "stand[ing] somewhat open" from the coat) and observe



a metal object strains credulity. Where a testifying officer claims to have seen that which common sense dictates could not have been seen, courts have repeatedly deemed this testimony patently tailored to meet constitutional objections [citations omitted].

Although it is the most conclusive evidence, the court does not rely solely upon the videotape recording to find a lack of probable cause. Sergeant Casmir's actions simply do not comport with the observation of a handgun as he describes it. His account defies common sense and, in this court's experience, established police procedure.

Sergeant Casmir would have the court believe that after observing what he believed to be a handgun in defendant's bag, instead of immediately using the pre-arranged code word that would have alerted his partner and fellow officers,<sup>7</sup> he allowed defendant to remain unrestrained and within arm's length, while he placed the bag on the ground between them. He then proceeded to question defendant about the location of her identification and her pedigree, while she, still unrestrained, was free to bend over him and the bag. Sergeant Casmir, in fact, directed defendant to step back against the nearby fence before he proceeded to rummage through the bag, using a flashlight.<sup>8</sup> Only after nearly 30 seconds of looking through the bag did Sergeant Casmir announce the pre-arranged code word, resulting in defendant being handcuffed.

In this court's experience presiding over countless suppression hearings, a primary concern of police officers is to ensure their own safety and that of their partners. This is especially true

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<sup>7</sup> Curiously, too, the videotape recording from Sergeant Casmir's body-worn camera shows that a number of additional plain clothes officers were on the scene of this jaywalking stop, well before the point at which he claims to have observed the handgun.

<sup>8</sup> The videotape recording from Sergeant Casmir's body-worn camera captured his search of the bag. Although the glare from the flashlight largely obscures the view of the inside of the bag, the contents do become visible at several points when the direction of the beam is changed. The court notes that Sergeant Casmir's search was lengthy and appeared to lead him to the bottom of the bag, where the yellow t-shirt was visible.

during street encounters. It is for this reason that Sergeant Casmir's actions after he claimed to have observed the handgun in defendant's bag contribute to the court's difficulty in crediting his testimony. If, in fact, he recognized the slide of a handgun in defendant's bag, Sergeant Casmir's failure to immediately alert his fellow officers is unfathomable. That under such circumstances, he would leave defendant unrestrained, while he and the bag remained within her immediate reach, is incomprehensible.

The court concludes, based upon the videotape recording in evidence and Sergeant Casmir's actions, that the handgun could only have been discovered upon Sergeant Casmir's extended search of the bag. His testimony that he observed the handgun while the bag was on defendant's shoulder must be rejected as "physically impossible, manifestly untrue, contrary to experience, or self-contradictory" (*People v Carmona*, 233 AD2d 142, 144 [1<sup>st</sup> Dept 1996]) and "patently tailored to nullify constitutional objections, or otherwise unworthy of belief" (*People v Hobson*, 111 AD3d 958 [2d Dept 2013], *lv denied* 22 NY3d 1156 [2014]); (*see also People v Maiwandi, supra* at 751; *People v Glenn*, 53 AD3d 622 [2d Dept 2008], *lv denied* 11 NY3d 832 [2008]; *People v Lebron, supra* at 787)).

The court finds that the People have failed to establish the legality of the police conduct in the first instance, and that the defendant's arrest was effected without probable cause.

#### Statements

With respect to defendant's challenge to the admissibility of her statements, the People must prove their voluntariness beyond a reasonable doubt (*see People v Holland*, 48 NY2d 861 [1979]; *People v Anderson*, 42 NY2d 35 [1977]; *People v Huntley*, 15 NY2d 72 [1965]). The People must also prove that defendant, who was subjected to a custodial interrogation, was advised of her *Miranda* rights and that she knowingly and voluntarily waived them (*see Miranda v Arizona*, 384

US 436 [1966]).

As stated in *People v Williams* (62 NY2d 285, 288-289 [1984]):

To be valid, an accused's waiver of his or her rights must be knowingly and intelligently made... [and] [a] court must always ascertain whether the defendant understood how the *Miranda* rights affected the custodial interrogation.... An individual may validly waive *Miranda* rights so long as the immediate import of those warnings is comprehended, regardless of his or her ignorance of the mechanics by which the fruits of that waiver may be used later in the criminal process (citations omitted).

As the Court of Appeals further stated in *People v Sirno* (76 NY2d 967, 968 [1990]), when a defendant indicates that he understands his *Miranda* rights and “promptly after having been administered those rights willingly proceeds to make a statement or answer questions during interrogation, no other indication prior to commencement of interrogation is necessary to support a conclusion that the defendant waived those rights” (citing *People v Davis*, 55 NY2d 731 [1981]; *North Carolina v Butler*, 441 US 369 [1979]).

After reviewing the testimony of Officer Schumacher and finding him to be credible, as well as watching the complete videotaped statements that were entered into evidence, the court finds that the People have proven, beyond a reasonable doubt, that defendant was sufficiently advised of her *Miranda* rights for the statements she made on videotape. Defendant knowingly and voluntarily waived those rights on both occasions and both statements were freely and voluntarily given.

The second videotaped statement made by defendant shortly after initially declining to answer questions was subject to the *Miranda* warnings previously administered by Officer Schumacher. That *Miranda* warnings were not repeated before defendant made this statement does not mandate suppression, as the defendant had been in continuous custody and the initial warnings had been given less than an hour before (see *People v Booker*, 141 AD3d 834 [3d Dept 2016], lv

*denied* 28 NY3d 1026 [2016]; *People v Carelli*, 41 AD3d 1092 [3d Dept 2007]).

However, based upon the court's previous finding that her arrest lacked probable cause, the statement is the result of an unlawful detention and arrest. Defendant's motion to suppress her statements is therefore granted.

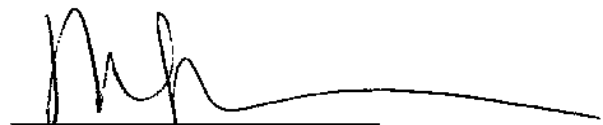
Property

At a *Mapp* hearing, the People have the initial burden of establishing the legality of the police conduct in the first instance (*People v Dunbar*, \_\_AD3d\_\_, 2020 NY Slip Op 07089 [2d Dept 2020]). The burden then shifts to defendant to prove, by a preponderance of the evidence, that the evidence should not be used against her (*see People v Berrios*, 28 NY2d 361[1971]; *People v Houston*, 177 AD3d 902 [2d Dept 2019]).

In the case at bar, the People have failed to establish that there existed probable cause to arrest defendant; therefore the evidence recovered incident to her arrest must be suppressed. This includes the DNA swab taken after her interview. Therefore, defendant's motion to suppress physical evidence is granted.

This constitutes the Decision and Order of the Court.

Dated: December 8, 2020

  
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J.S.C.